

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 910 OF 2004

Smt. Anusayabai @ Kachyabai
Shivram Salve ..Appellant
V/s
Smt. Parvatibai Hari Shejwal ..Respondent

Mr. S.H.Joshi for the Appellant.
Mr. H.T.Pawar for the Respondent.

CORAM: A.S.OKA, J.
DATE : 05.05.2005.

P.C.:

1. Heard Shri. Joshi for the Appellant and Shri. Pawar for the Respondent No.1. The office noting shows that Respondent No.2 is served. The following substantial questions of law arise:

(i) Whether the Appellate Court has committed an error by not deciding the plea of the Appellants based on bar created by law of limitation?

(ii) Whether the Appellate Court has committed an error by not framing proper points for determination?

2. The Second Appeal is preferred by the original Defendant No.1. The Respondent No.1 is the original Plaintiff and the Respondent No.2 is the original Defendant No.2. The suit filed by the original Plaintiff was contested by the Appellant by raising various contentions. One of the contention was that the suit was barred by limitation. The Trial Court framed specific issue on the plea of bar of limitation. The

Trial Court decreed the suit filed by the Respondent No.1. An appeal was preferred by the present Appellant to District Court. The said appeal has been dismissed.

3. Shri. Joshi appearing for the Appellant submitted that the plea of bar of limitation was specifically agitated in the Appellate Court. He pointed out that there is no point for determination framed on the basis of plea of bar of limitation and there is no discussion on the basis of the said plea. He, therefore, submitted that order of remand deserves to be passed. Shri. Pawar supported the impugned Judgment and Decree.

4. I have considered the rival submissions. In paragraph No.5 of the Judgment of the Appellate Court, it is stated that the Appellant has challenged the decree of the Trial Court on the grounds set forth in the Appeal memo. The Appellate Court has not recorded submissions made by the Appellants. The memorandum of the appeal filed in First Appellate Court shows that ground based on the bar of limitation was specifically taken. Perusal of the Judgment of the Appellate Court shows that there is no discussion about the issue of bar of limitation. There is no point for determination framed on this aspect. There is nothing to indicate from the Judgment of the Appellate Court that the plea of bar of limitation was adjudicated.

5. The issue of limitation is a mixed question of fact and law and, therefore, the First Appellate Court being final Court of facts is required to decide the said

issue. Hence, there is no option but to pass the order of remand. Hence, the following order:

: O R D E R :

i) The impugned Judgment and Decree dated 6th April, 2004 passed by the First Appellate Court is quashed and set aside and Civil Appeal No.157 of 2000 is restored to file.

ii) Parties are directed to appear before learned District Judge, Nashik on 13th June, 2005 at 11.00 am., for fixing the schedule of hearing of the Appeal.

iii) District Judge will either decide the appeal himself or assign it to any other Judge. The Appeal shall be heard and decided expeditiously and preferrably before the end of December 2005.

iv) While deciding the appeal afresh, the Appellate Court will frame all points for determination arising in the appeal.

v) The appeal is allowed in the above terms with no order as to costs.

vi) Parties and the concerned Court to act upon authenticated copy of this order.

(4)

(JUDGE)